

LECTURE

IMMIGRATION AT THE TURN OF THE NEW CENTURY*

*Peter H. Schuck***

Migration is perhaps the most insistent world phenomenon of our age. The propensity to migrate in search of a better life has always been among the most powerful of human drives, and perhaps never more than today.

Migration theorists attempting to explain population movements often distinguish between so-called push and pull factors. Before the modern age, push factors, such as population pressures, starvation, soil exhaustion and other economic and environmental dislocations, persecution, and warfare probably accounted for almost all human migration. Today, however, contemporary conditions have sharpened many of these traditional migratory spurs. Better and cheaper communications and transportation technologies have also brought various pull factors into play, such as the unification of far-flung families, globalizing work and trade opportunities, and the lure of more stable and tolerant nation-states.

This migration is truly a world phenomenon. For now, at least, these migratory pressures are perhaps greatest on North America--particularly on the United States but also, to a lesser extent, Canada. Social and political conditions in Central and South America have created a vast, growing pool of poor, unemployed, and mobile people with rising expectations and their eyes fixed northward. Only a long, permeable, and intermittently defended border separates them from the magnetic American labor market, a border that they have been crossing for generations with only temporary setbacks. The migratory pressures, however, are unprecedented for Western Europe except during World War II. Only the Mediterranean (or perhaps only the Straits of Gibraltar) and the porous buffer states of central Europe, such as Poland, protect western Europe from potential flows of desperately poor, low-skilled, and ethnically diverse

* This lecture was given October 26, 2000 at Case Western Reserve University School of Law for the Frederick K. Cox International Law Center and the Case Western Reserve Journal of International Law.

** Professor Schuck is the Simon E. Baldwin Professor of Law at Yale Law School.

workers and their families from Africa, the Middle East, and Asia. These flows could eventually dwarf those now reaching North America.

In this brief essay, I want to advance two broad propositions. First, I contend that these migratory pressures pose a challenge to the U.S. and to the other destination states whose stakes can hardly be exaggerated. Second, I argue that the U.S., despite its well-known immigration policy failures, is nevertheless meeting this challenge more effectively and justly than perhaps any other major immigrant-receiving state. Only Canada is even arguably comparable, and its context is in some ways quite different from the United States.

I. THE STAKES

U.S. immigration policy, together with America's distinctive social and legal modes of assimilating immigrants, determine--in a tautological sense--the answers to the kinds of political identity questions that arise in any democratic polity: Who are we? What do we wish to become? How shall we reach that goal? And, most fundamentally, which individuals constitute the "we" who shall decide these questions--in more formal terms, the "We the people" who govern ourselves in the name of the United States of America under the Constitution?

In the calamitous Dred Scott decision of 1857, Chief Justice Roger Taney held that this last question had been resolved at the Founding and that the Founders' answer excluded slaves and the descendants of slaves from membership in the American polity. The Civil War decisively rejected that answer, of course, and the constitutional amendments that ensued set us on a path whose broad inclusiveness would have astonished all of the framers of those Reconstruction amendments and would surely have appalled some of them.

The stakes involved in defining "We the people" can be understood by considering three temporal perspectives on that definition: past, present, and future. Thinking about the *past* invites us to imagine our political identities as connected in some sense to those who created and constantly transformed the polity and society that today's Americans have inherited. Every nation tells itself stories about foundings, bloodlines, ancestry, peoplehood, nation-building struggles, and cultural development. Some of these stories, of course, are more true than others, but historical accuracy is not the stories' point; self-definition is. In any event, these stories together constitute a nation's historical identity, or what political theorist Benedict Anderson called its "imagined community."

This imagined community in the American case is no longer the community of white, Anglo-Saxon Protestants and their descendants who established the colonies in the 17th century. In his recent book, *Civic Ideals*, my Yale colleague Rogers Smith elaborates the principal competing visions of American political identity through the Progressive Era. He argues that

the now-dominant *mythos* of a diverse, inclusive, immigrant nation, of an amalgam of cultures forming a civic polity in which membership depends not on any particular ethnicity or sectarian creed, but only on a belief in the principles of the Constitution, was never firmly established but has always been besieged by other, more restrictive visions that promote, and sometimes secure, racist politics and exclusionary policies. Unlike Smith, I believe that the more inclusive vision has now triumphed decisively and permanently. Although it will always be fiercely contested, it is now firmly entrenched in U.S. law, politics, and institutions.

The perspective of the *present* focuses on who is--and who should be-- entitled to decide on the shape of American society. It is concerned with political-democratic competence, with rules governing participation, and with the cultivation of those values, faculties, and institutions that tend to produce wise and engaged citizens who will cherish and seek to enrich and perpetuate this kind of polity. Finally, the perspective of the *future* considers what we want our society to look like and which policies are likely to move us toward that goal.

These three perspectives on the identity of "We the people" are intimately connected, of course, and cannot really be disentangled. Our future as a society largely depends on our current choices. (I say "largely" because we have imperfect control of the conditions that shape society.) These choices in turn inevitably reflect how we understand our peoplehood and its history, and what our aspirations for the nation are. Immigration policy is one of the most consequential of those choices for a very simple reason: it affects literally everything else.

Consider how immigration shapes demographics, economics, and politics. Current immigration policies determine, literally, what America "looks like" now and will look like in the future. Immigration is a significant driver of U.S. population growth, today accounting for almost 40% of that growth. Immigrants not only increase the population themselves but also tend to have higher fertility rates than Americans generally. (However, these fertility differences diminish over time.) The current level of "permanent" immigration to the U.S., including both legal and illegal flows, is as high or higher than at any time in American history. The percentage of the U.S. population that is foreign-born is steadily rising and now approximates 10%, which is still well below the 14% share reached in the first decade of the 20th century. Immigration's demographic effects, however, go well beyond mere numbers, determining the age, racial, ethnic, linguistic, religious, and source-country composition of the population, as well as how the population is distributed geographically across the U.S.

Immigration is also a major determinant of our economic profile. On the labor supply side, immigration affects the mix of job skills available in the economy as well as the prevailing wage rates, entrepreneurial investment, and the conditions of work. Immigration also affects the

demand side--consumer goods, human capital, housing, education, social services, and a host of other goods and services. These myriad effects mean that immigration's economic impact is by no means confined to the immigrants themselves but extend to the rest of the population.

Consider the "non-immigrant" workers admitted for ostensibly "temporary" work. Congress has steadily liberalized these guestworker programs with respect to numbers, eligibility conditions, and opportunities to adjust to permanent status, and will continue to do so as the result of additional amnesties enacted already or in the near future. On the low-skill side, the U.S. has been formally admitting agricultural workers for temporary and seasonal periods at least since the Bracero program was established in 1943, yet a large number of these workers have managed to remain permanently in the U.S. Many of these have obtained permanent legal status; 2.7 million did so under the 1986 amnesty program alone, and many more will do so under new amnesty provisions. On the high-skill side, President Clinton has just signed the "American Competitiveness in the Twenty-First Century Act of 2000," passed by overwhelming bipartisan votes in both houses, which will further expand the H-1B visa program (doubled as recently as 1998) to admit for each of the next three years 195,000 computer programmers, computer scientists, systems analysts, and other high-tech workers for periods of up to six years. If past is prologue, many of these temporary workers will actually end up receiving permanent residence visas. Today, about one in six U.S. workers is foreign-born.

Finally, immigration profoundly shapes our politics at all levels. Immigration policy was a fiercely-contested issue throughout the 1980s and 1990s. Indeed, the year 2000 national elections are the first in many years in which immigration is not a major campaign issue. Its political impacts, however, transcend particular election cycles or policy debates. Almost 875,000 immigrants naturalized in 1999, a number that was limited because of the huge backlog at the INS, where 865,000 immigrants were awaiting naturalization in September 2000. Because immigrant groups are not randomly distributed either ideologically or geographically, their political preferences can significantly affect candidates' policy positions. Immigration's political effects are further magnified by the U.S. federal system. With immigrants heavily concentrated in a relatively small number of states and metropolitan areas, they may hold the balance of power in some state and local elections. A small number of localities, moreover, permit non-citizens to vote in their elections, a practice that other jurisdictions may well adopt in the future as their immigrant populations grow.

Immigration politics can affect a wide range of domestic policy issues, but its most obvious impact is on foreign policy. Immigrant groups retain a special interest in U.S. policy toward their countries of origin. This interest often extends well beyond the groups' first and second generations in the U.S., as the experiences of hyphenated Americans ranging from

Armenians to Zambians demonstrate. One cannot understand U.S. policy toward Cuba, the Middle East, the former Soviet Union, and India without taking Americans' continuing ethnic linkages into consideration. And quite apart from these linkages, much immigration policy deeply implicates our relations with other countries--a fact often stressed by the Supreme Court when it invokes the "plenary power doctrine" as a justification for judicial deference to the political branches on immigration-related issues.

The immense stakes in immigration policy are nicely captured in the apocryphal lamentation of Chief Sitting Bull after the disastrous battle that forced his tribe to leave their ancestral lands: "We should have paid more attention to our immigration policy."

II. THE DISTINCTIVENESS OF THE U.S. RESPONSE TO THE MIGRATION CHALLENGE

The U.S. approach to migration, I want to argue, is distinctive and in some ways unique among the world's nation-states. In some important areas, America's performance has been highly successful by any comparative standards. Examples include the integration of immigrants into American society and the "management" (for want of a better term) of migration-related diversity. In some other areas of immigration policy, however, the U.S. has failed, although perhaps no more than other receiving countries have failed. Examples include its inability to control undocumented migration, to expeditiously remove criminal aliens, and perhaps most important, to lawfully, equitably, and efficiently administer the immigration statute. Both the successes and the failures of U.S. policy are essential parts of the overall record.

Probably the most unique feature of American society is its affirmative embrace of diversity of every conceivable kind: demographic, ethnic, linguistic, religious, economic, cultural, geophysical, and so forth. No other state exhibits America's level of diversity over so many different social domains, and no other state views diversity not as a regrettable necessity with which it must somehow make its peace not as a grudging concession to a colonial past, but rather as a condition that society values as an end in itself. The only possible exception is Canada, which occupies an enormous land mass with only 28 million inhabitants, and is eager to increase its population. Indeed, Canada's very survival as a nation demands a fundamental commitment to protect cultural diversity, one enshrined in its constitution.

Indeed, the U.S. in 1990 enacted a program authorizing the creation of 55,000 permanent immigration slots, denominated as "diversity" visas in the statute, that were designed to increase migration to the U.S. from source countries whose nationals had supposedly been disadvantaged by the elimination in the 1965 law of the system of national origins quotas. Using immigration policy to increase the already extraordinary diversity in the

U.S. is even more remarkable because an inevitable consequence is to accelerate an irreversible transformation of the nation's racial, ethnic, and religious composition, a fact that is widely understood in the U.S.

I am aware of no other society in history that has accepted such a transformation with its eyes wide open. Indeed, as noted earlier, the U.S. has not merely acquiesced in its transformative diversity; it has affirmatively contrived and embraced it, even fashioning an ideology of diversity designed to justify this development. Canada's multi-cultural policy is more extensive than that of the U.S. but Canada, unlike the U.S., requires its policy in order to quell separatist movements that even now threaten to unravel the nation. France, Germany, and some other EU states are moving slowly toward a greater acceptance of diversity. In each case, however, their limited moves toward acceptance of diversity are grudging, politically fragile, and possibly reversible.

The most dramatic evidence of the ardent commitment of the U.S. to diversity is that both major parties and virtually all political elites support the expansionist legal immigration policy that Congress enacted a decade ago in the midst of an economic recession (albeit one that we now know was relatively mild), a policy that political leaders of both parties have now maintained through an entire business cycle and show no signs of abandoning. Indeed, the platforms of the Democratic and Republican parties on immigration and diversity issues (other than affirmative action) for the 2000 elections are almost indistinguishable.

The U.S., moreover, is the only major immigration receiving country in which no significant nativist or even restrictionist party exists. Underscoring this remarkable fact is the continued political marginality of Pat Buchanan's party despite its receipt of substantial federal subsidies for its campaign. Even organized labor, the strongest traditional opponent of expansive immigration, now favors both a new amnesty for long-term resident undocumented aliens and the repeal of the 1986 employer sanctions law that discourages firms from hiring undocumented workers who might compete with union members for jobs.

This broad political support in the U.S. for expansive immigration becomes even more remarkable when one considers the policy context. First, as noted earlier, the racial, ethnic, linguistic, religious, and source country composition of current immigration to the U.S. is more diverse than ever before. Today, almost three-quarters of legal immigrants are from Asia, Latin America, and the Caribbean; the five leading source countries are Mexico, the Philippines, India, Vietnam, and mainland China. Few of these immigrants are white and only the Philippines and India send many fluent English-speakers. Relatively few immigrants have the European ancestry that largely peopled the U.S. originally. More Muslims and Hindus now live in the U.S. than do Episcopalians, and the gap is certain to grow.

Second, this diversity is not unproblematic. It poses massive, arguably unprecedented challenges to the capacity of the U.S. to assimilate these immigrants, especially those who lack strong job and English language skills in a technologically advanced economy. Yet the legal admissions criteria for immigrants show little concern about whether or not they possess those skills. Indeed, the vast majority are selected for permanent residency because they are related to U.S. citizens or permanent resident aliens. Well under 20% are selected for their job skills, and neither English fluency nor other indicia of easy assimilability other than family ties is a direct criterion at all. (As we shall see, many temporary immigrant visas are skills-related, though most are not.) The U.S. admits many low-skill immigrants despite the fact that it has a large native-born population of low-skill workers who already suffer from low wages and relatively high unemployment rates.

Third, an estimated 8 million illegal migrants live more or less permanently in the U.S. today, with the number growing by 250,000-300,000 each year. The fact that these levels are as high or higher than ever before is not due to policymakers' inattention or passivity. During the last decade when Congress imposed budgetary discipline throughout the federal government, it vastly increased the fiscal and staffing resources allocated to border and interior enforcement. The U.S., it is fair to say, has now tried every plausible legal, political, and technological remedy for this problem without substantially reducing the overall illegal flow.

Fourth, a large and growing population of criminal aliens exists in the U.S. despite more energetic efforts by the INS to deport them and, even though many of them are in custody or under supervision, they have no political support or legal defenses, and are subject to swift removal under new enforcement procedures enacted in 1996. The INS's inability to remove this population is a source of great public dissatisfaction with current enforcement efforts, but its reputation for administrative incompetence and political clumsiness goes far beyond the criminal alien problem. Indeed, a multitude of court decisions, legislative hearings, and GAO reports have documented its recurrent lawlessness.

Remarkably, even these contextual factors have not stood in the way of an expansive immigration policy but they do help to explain some intriguing factors that qualify its political support. Public opinion polls, for example, indicate that the general public admires the values of the immigrants that they know personally but that they (like most of the immigrants themselves) draw a rather sharp distinction between "good" immigrants and "bad" immigrants. In this view, good immigrants enter the U.S. legally, work hard, learn English, become naturalized citizens, raise strong families, and stay out of trouble, while bad ones enter (or remain) illegally, rely on welfare and other taxpayer-supported benefits, fail to learn English and assimilate, and commit crimes. In contrast to the political elites who dominate immigration lawmaking, the general public

consistently favors lower levels of both legal and illegal immigration. Americans take pride in their own immigrant past and in the nation's relatively inclusive traditions, but they also strongly support official reaffirmations of the nation's commitment to the primacy of the English language. In short, Americans who favor immigration and diversity still worry about the number and assimilability of immigrants. Indeed, they have always worried about this, even before the 1970s when there were fewer, far less diverse immigrants.

Certain other policies also reflect the institutionalization of immigration and diversity in American public life. The principle of birthright citizenship, that every individual (with exceptions that are irrelevant for present purposes) who is born on United States territory is automatically and instantaneously a citizen, was established in 1868 by the Fourteenth Amendment to the Constitution. This principle, also known as *jus soli*, is by no means unique to the U.S.; it was the rule in many other states, notably England, long before America was founded. In few if any other *jus soli* states, however, is the birthright citizenship rule as liberal as in the American version. Under this version, one born on U.S. soil, even of parents who are both here illegally and briefly, acquires the status. This expansive rule has carried the day despite some doubt about whether the Congress that adopted the Fourteenth Amendment intended this result.

The U.S. also recognizes dual (or even triple) citizenship, a recognition that greatly facilitates immigrants' assimilation. Multiple citizenships may be acquired when individuals whose parents are U.S. citizens are born abroad in countries that confer their own birthright citizenship, when individuals are born in the U.S. of foreign parents who can transmit their foreign nationalit(ies) to the child, when citizens of other states naturalize in the U.S. and retain their original nationalities, or when U.S. citizens naturalize in other countries. The U.S. is not at all unique in recognizing and permitting dual citizenship; even states like Germany that still do not think of themselves as states of immigration and that traditionally opposed dual citizenship are now making it somewhat easier to acquire and retain. Indeed, the U.S., unlike some other states, requires all newly naturalizing citizens to take an oath renouncing their other nationalities, although they may retain another state's nationality if, as is increasingly the case, the other state does not give legal effect to its nationals' renunciations. No one knows the number of dual citizens in the U.S. but the number is certainly growing, especially as many sending states now seek to facilitate the acquisition of U.S. citizenship by their nationals.

Acquisition of citizenship through naturalization in the U.S. is easy and swift compared to the practice in most other industrialized nations, although here, too, practices are converging. Even Germany, the standard example of an ethnically-defined nation, has now relaxed its language and other requirements for naturalization. In the U.S., the residency, moral, knowledge of civics, and other requirements are relatively easy to satisfy;

very few individuals who complete their petitions are rejected, and the English language test is notoriously simple to pass. (In a recent study many newly-naturalized citizens self-reported that they cannot speak English.) The political institutionalization of this easy naturalization regime is suggested both by how few changes have been enacted since 1917 when the literacy test was established, and by the failure of today's restrictionists to persuade Congress to enact reforms in the face of unprecedented linguistic and other diversities magnifying the obstacles to assimilation.

This assimilation challenge, of course, confronts all receiving countries, not just the United States. The American approach to assimilation, however, appears to be unique. Other states view the integration of immigrants as largely a governmental responsibility demanding national and sometimes local policy interventions. In contrast, the U.S. treats assimilation as primarily the responsibility of the immigrants themselves, perhaps aided by their ethnic communities at the local level. This approach, which is consistent with the more general commitments to limited government, privatism, and laissez-faire arrangements characteristic of the American public philosophy, emphasizes the primacy of individual and communal responsibility for individuals' social identities and welfare. In this view, government's role is to provide immigrants' children (undocumented as well as legally admitted) with access to publicly-funded education, including civics and English instruction. Adult immigrants, however, are presumed to have powerful economic and social incentives to learn English through their own devices, though long waiting lists for English language classes suggest that more help may be needed. Civics instruction for adults often falls by the wayside, at least until they decide to naturalize (and perhaps even then, given the rudimentary nature of the civics test).

Since the welfare reforms of 1996, non-citizen immigrants are ineligible for non-emergency social welfare benefits under federal law. This reflects not only a budget priority decision about the allocation of scarce welfare benefits but also a widespread public view that immigrants should not be assimilated into a culture that legitimates dependency on taxpayer support. Having strongly repudiated this culture of dependency for U.S. citizens, Congress could hardly treat immigrants differently. This makes even more noteworthy the fact that the major immigrant-receiving U.S. states have responded to the federal cut-off of immigrants by extending wholly state-funded benefits to many legal immigrants.

Many immigrant advocates contend that the U.S. has turned its back on immigrants, citing not only welfare reform but also the passage, in 1996, of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA, enacted at the end of the decade to protect America, is the most radical reform of immigration law in decades, or perhaps ever, revamping enforcement in ways that even many INS officials find arbitrary, unfair, and unworkable. As I have argued elsewhere, many of the law's

procedures are harsh and unjust, will have perverse effects, and should be changed. Indeed, challenges to the constitutionality of some of these provisions are now being heard by the Supreme Court. Even IIRIRA's recklessness and unfairness, however, should not obscure a fundamental fact. Although the new law is certainly tough on undocumented and criminal aliens and arbitrary toward asylum seekers and deportation hardship cases, it has little effect on the vast majority of immigrants who have always abided by U.S. laws.

Indeed, an assessment of public attitudes in the U.S. today toward even some "bad" immigrants must also take account of the new amnesty programs enacted in the late 1990s to protect many undocumented migrants from Central America. These amnesties will probably be expanded once again in the near future to include other undocumented migrants from the region as well as others who have been in the U.S. since the mid-1980s. Together with a continuing high level of permanent legal immigration and increased guestworkers, these amnesties constitute better evidence of our immigration policy's comparative inclusiveness than the IIRIRA's use of many over-broad, Procrustean, and harsh provisions to secure the removal of criminal aliens.

CONCLUSION

Two paradigms of immigration compete for the public's attention and allegiance. The first, captured in the iconic symbolism of the Statue of Liberty and the melting pot, is boundlessly optimistic. It boasts pride in our brave ancestors who came (or were dragged in chains) to America's shores and who built the country literally from the ground up. It celebrates the immigrant *mythos* as a parable for our time, and for all time, of success against great odds. The continuing vitality of this *mythos* today is confirmed by social mobility of the Korean greengrocer, the West Indian professional, the Taiwanese engineer, the Indian computer programmer, the Filipino nurse, and countless other immigrants.

The second paradigm is one of anxiety and doubt. It is captured in the imagery of Mexicans streaming across the southern border (flood metaphors are especially popular), Dominicans on welfare in New York City, juvenile street gangs and adult tongs in Chinatowns across the country, third world terrorists bent on stealthy destruction, illiterate Hmong tribesmen transplanted to communities unprepared to deal with them, and costly bilingual education programs that fail to teach English effectively. Instead of optimism, there is fear that America's assimilative capacity has finally been exhausted, that we are losing control over our sovereignty and destiny, and that we have become the victims of our own generosity, the dupes of our own history and illusions.

We can learn much by taking both of these paradigms seriously. Immigration carries significant risks as well as alluring opportunities. The

nature of these risks and opportunities, and the precise balance between them, are constantly changing and thus must be open for public debate. In a kind of political path dependency, however, the U.S. has maintained a receptiveness to immigrants that remains distinctive in the world, a willingness to accept a level of convulsive social change that other liberal democratic societies, most of which are more avowedly egalitarian than the U.S., have considered to verge on cultural suicide. The future, I think, will be much kinder to our tradition than to theirs. Immigration and diversity are aspects of American exceptionalism that they would do well to emulate--while they still have some choice in the matter.

